UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

LEV GRIGORYOU,

Plaintiff,

v.

PALLET SERVICE INC.,

Defendant.

REPORT, RECOMMENDATION AND ORDER

13-CV-00526(A)(M)

This case was referred to me by Hon. Richard J. Arcara for supervision of all pretrial proceeding, including the preparation of a Report and Recommendation on dispositive proceedings [10].[1] Before me is defendant Pallet Service, Inc.'s unopposed motion to dismiss plaintiff Lev Grigoryou's Complaint pursuant to Fed. R. Civ. P. ("Rule") 12(b)(6) [6], and plaintiff's motion for appointment of counsel [9]. For the following reasons, plaintiff's motion [9] is denied, without prejudice, and I recommend that defendant's motion be granted, without prejudice to plaintiff filing an Amended Complaint.

BACKGROUND

Plaintiff commenced this action *pro se* using a form complaint alleging employment discrimination, in violation of the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§621-634. Complaint [1], p. 1 of 12. The Complaint provides scant detail of plaintiff's allegations. It alleges that he began his employment with defendant on September 1, 2011, that the first alleged discriminatory act occurred between November 28 and

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[1] Bracketed references are to the CM/ECF docket entries.

December 2, 2011, and that these acts are still being committed against him. Complaint [1], ¶¶4, 5, 7.[2] He seeks relief based on his termination and for hostile work environment. Id., ¶13.

The only specifics as to what transpired are set forth in the Charge of Discrimination he filed with the Equal Employment Opportunity Commission ("EEOC"), which is attached to the Complaint. The Charge states that he began working for defendant as a Conveyor Belt Worker on September 1, 2011, and that

> "[o]n or about April 16, 2012, Respondent approached me and grabbed my protective gear off my head and began to verbally abuse and physically assault me stating that I was not working fast enough. Three . . . workers were required to work in the conveyor belt area and Respondent removed two . . . of the workers which forced me to work alone at a faster pace.
>
> Continuing into my shift, Respondent became increasingly hostile and increased my work load. Respondent also sent younger employees (who were outside the protected age group) from another work area to encourage me to work faster without additional help.
>
> On or about April 16, 2012, Respondent terminated my employment alleging misconduct.
>
> I believe that I was harassed and discriminated against because of my age/51 years old". Complaint [1], p. 10 of 12.[3]

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[2] Although plaintiff alleges that he began his employment on September 20, 2013- *after* the Complaint was filed on May 17, 2013 (Complaint [1], ¶4), I assume from that this was erroneous.

[3] Curiously, the Complaint also attaches a February 19, 2013 right-to-sue letter from the EEOC to plaintiff, which states that "[d]uring the Intake Interview on January 30, 2013, you stated that you believe the reason for your termination was because you were an extra worker and not because . . . of your age". Complaint [1], p. 12 of 12. Moreover, in contrast to the Complaint, which alleges that the alleged discrimination commenced between November 28 and December 2, 2011 and continued thereafter (Complaint [1], ¶¶5, 16), the Charge limits the alleged discrimination to April 16, 2012. Id., p. 10 of 12.

Shortly after defendant moved to dismiss the Complaint, and before I issued a briefing schedule on defendant's motion, plaintiff moved for appointment of counsel [9]. My briefing schedule, which was mailed to plaintiff, required his response to defendant's motion by September 2, 2013 [11].

To date, no response or motion for an extension of the September 2, 2013 deadline has been filed. Nevertheless, I "cannot grant a motion to dismiss solely on the ground that it is unopposed. Rather, where a Rule 12(b) motion has not been opposed, this Court must review the merits of the motion and determine whether the movant has carried its burden." Foster v. Phillips, 2005 WL 2978686, *3 (S.D.N.Y.2005). *See* McCall v. Pataki, 232 F.3d 321, 323 (2d Cir. 2000) ("If a complaint is sufficient to state a claim on which relief can be granted, the plaintiff's failure to respond to a Rule 12(b)(6) motion does not warrant dismissal").

ANALYSIS

A. Plaintiff's Motion for Appointment of Counsel

Although plaintiff concedes that he has not discussed his case with any attorneys, he alleges that he lacks sufficient resources for an attorney [9]. Apart from his lack of resources, plaintiff provides no explanation for why appointment of counsel is warranted.

There is no constitutional right to appointed counsel in civil cases. However, under 28 U.S.C. §1915(e)(1), the Court may appoint counsel to assist indigent litigants. *See, e.g.*, Sears, Roebuck & Co. v. Charles W. Sears Real Estate, Inc., 865 F. 2d 22, 23 (2d Cir. 1988). The decision as to whether or not to assign counsel lies clearly within the court's discretion. *See* In re Martin-Trigona, 737 F. 2d 1254, 1260 (2d Cir. 1984). The factors to be

considered include the following: (1) whether the indigent's claims seem likely to be of substance; (2) whether the indigent is able to investigate the crucial facts concerning his claim; (3) whether conflicting evidence implicating the need for cross-examination will be the major proof presented to the fact finder; (4) whether the indigent has the ability to present the case; (5) whether the legal issues involved are complex; and (6) whether there are any special reasons why appointment of counsel would be more likely to lead to a just determination. *See* Hodge v. Police Officers, 802 F.2d 58, 6162 (2d Cir. 1986); Carmona v. United States Bureau of Prisons, 243 F. 3d 629, 632 (2d Cir. 2001); Garcia v. USICE (Dept. of Homeland Security), 669 F.3d 91, 9899 (2d Cir. 2011).

Having considered these factors, I conclude that appointment of counsel is not warranted at this time. Since the case is still at an early stage, the merit (or lack thereof) of plaintiff's claims is difficult to assess. Moreover, plaintiff has not shown that he is incapable of investigating the facts of this case or conducting discovery. Therefore, plaintiff's motion for appointment of counsel is denied, without prejudice to his ability to re-apply for appointment of counsel if this case proceeds. At this time, it remains plaintiff's responsibility to retain an attorney or to prosecute this action *pro se*.

B. Defendant's Motion to Dismiss

"When, as here, the complaint is filed by a *pro se* plaintiff, we construe the complaint liberally, interpreting it to raise the strongest arguments that it suggests." Caro v. Weintraub, 618 F.3d 94, 97 (2d Cir. 2010). Moreover, "the court should not dismiss without

granting leave to amend at least once when a liberal reading of the complaint gives any indication that a valid claim might be stated". Branum v. Clark, 927 F.2d 698, 705 (2d Cir. 1991).

1. Termination

"To establish a *prima facie* case of age discrimination, a plaintiff must show four things: (1) he is a member of the protected class; (2) he is qualified for his position; (3) he has suffered an adverse employment action; and (4) the circumstances surrounding that action give rise to an inference of age discrimination." Mingguo Cho v. City of New York, __ Fed. Appx. __, 2013 WL 6570611, *2 (2d Cir. 2013) (Summary Order).

Defendant only challenges the forth prong, arguing that plaintiff has not "made any allegation that would connect his membership in the protected class to his termination". Defendant's Memorandum of Law [7], p. 4. I agree. The only age-related allegation plaintiff makes is that defendant sent "younger employees" to "encourage him to work faster". Complaint [1], p. 10 of 12. While plaintiff may be able to sufficiently allege a claim under the ADEA arising from his termination, he has not done so based on the limited allegations of the current Complaint. Therefore, I recommend that this claim be dismissed, without prejudice.

2. Hostile Work Environment

"A plaintiff bringing a hostile work environment claim under the ADEA must show that the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently pervasive to alter the conditions of the victim's employment . . . . Minor incidents do not merit relief. To establish a hostile work environment, plaintiffs must prove that the incidents

were sufficiently continuous and concerted to be considered pervasive. A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class." Francis v. Elmsford School District, 263 Fed.Appx. 175, 177 (2d Cir. 2008) (Summary Order).

However, even isolated incidents may rise to the level of a hostile work environment, where "they are of sufficient severity to "alter the terms and conditions of employment as to create such an environment". Demoret v. Zegarelli, 451 F.3d 140, 149 (2d Cir. 2006). "A plaintiff must also demonstrate that she was subjected to the hostility because of her membership in a protected class" Francis, 263 Fed.Appx. at 177, and "must also plead enough facts that the hostile work environment can be imputed to the employer in order to establish employer liability for hostile actions taken by its employees". Smith v. HBO, 2013 WL 2285185, *2 (E.D.N.Y. 2013).

Defendant seeks to dismiss plaintiff's hostile work environment claim, arguing that the Complaint only alleges an isolated incident not attributable to plaintiff's age. Defendants' Memorandum of Law [7], pp. 5-6. I question whether this isolated incident, if fully credited, could be considered minor. Nevertheless, even assuming that it was sufficiently severe to support a hostile work environment claim and that all of the alleged conduct could be attributed to defendant, plaintiff fails to allege that the hostile work environment he experienced was attributable his age. Therefore, I recommend that this claim be dismissed, without prejudice.

CONCLUSION

For these reasons, plaintiff's motion for appointment of counsel [9] is denied, without prejudice, and I recommend that defendant's motion to dismiss [6] be granted, without prejudice to plaintiff filing an Amended Complaint.

Unless otherwise ordered by Judge Arcara, any objections to this Report, Recommendation and Order must be filed with the clerk of this court by March 3, 2014 (applying the time frames set forth in Rules 6(a)(1)(C), 6(d), and 72(b)(2)). Any requests for extension of this deadline must be made to Judge Arcara. A party who "fails to object timely . . . waives any right to further judicial review of [this] decision". Wesolek v. Canadair Ltd., 838 F. 2d 55, 58 (2d Cir. 1988); Thomas v. Arn, 474 U.S. 140, 155 (1985).

Moreover, the district judge will ordinarily refuse to consider *de novo* arguments, case law and/or evidentiary material which could have been, but were not, presented to the magistrate judge in the first instance. Patterson-Leitch Co. v. Massachusetts Municipal Wholesale Electric Co., 840 F. 2d 985, 990-91 (1st Cir. 1988).

The parties are reminded that, pursuant to Rule 72(b) and (c) of this Court's Local Rules of Civil Procedure, written objections shall "specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for each objection . . . supported by legal authority", and must include "a written statement either certifying that the objections do not raise new legal/factual arguments, or identifying the new arguments and explaining why they were not raised to the Magistrate Judge". Failure to comply with these provisions may result in the district judge's refusal to consider the objections.

Dated: February 14, 2014

/s/ Jeremiah J. McCarthy
JEREMIAH J. MCCARTHY
United States Magistrate Judge